IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 25, 2007 Session

GEORGE W. SULLIVAN v. HILARIA B. SULLIVAN

Appeal from the Chancery Court for Bledsoe County
No. 2401 Jeffrey F. Stewart, Chancellor

No. E2007-00163-COA-R3-CV - FILED MARCH 31, 2008

This case involves a Tenn. R. Civ. P. 60.02 attack on a Tennessee divorce judgment. Hilaria B. Sullivan ("Wife"), a resident of the South Pacific island of Palau, challenges the propriety of a 1993 default judgment secured by George W. Sullivan ("Husband"), which was entered in Husband's divorce suit after Wife failed to respond to notice by publication in a Tennessee newspaper. Wife seeks relief under Tenn. R. Civ. P. 60.02(4) and (5). She claims that Husband, who has since remarried, knew her mailing address in 1993 or easily could have discovered it, and that, therefore, notice by publication was inadequate. The trial court declined to set aside the divorce, but altered the property distribution in Wife's favor and applied its new distribution retroactively, thus resulting in Husband owing a substantial arrearage. Husband appeals. He argues that Wife's Rule 60.02 challenge is untimely because, according to him, she knew about the divorce by 1996, yet waited another six years before challenging it; that, in any event, Rule 60.02(4) does not allow retroactive relief and Rule 60.02(5) is not implicated by these facts; and that Husband should not have been ordered to designate Wife as the beneficiary of his survivorship plan. We affirm.

Tenn R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J. and SHARON G. LEE, J., joined.

Richard B. Teeter, Chattanooga, Tennessee, for the appellant, George W. Sullivan.

Jennifer A. Mitchell, Dunlap, Tennessee, for the appellee, Hilaria B. Sullivan.

OPINION

Husband began serving in the United States Navy in 1961. He married Wife in 1965. They had five biological children and also adopted a child. They separated in 1988, at which time they executed a separation agreement that included the following pertinent terms:

> [Husband and Wife] desire to fully and finally determine and settle all their property rights against and between each other which have arisen from or may relate to, their marriage. This includes but is not limited to support and maintenance, dower, courtesy [sic], alimony, homestead and similar marital rights and relationships as well as the actual division of real and personal property involved in the marriage.
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> ACCORDINGLY, in exchange for good and valuable consideration received and the mutual promises contained herein, the Husband and Wife agree as follows:
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> * * *
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> 2. ACCEPTANCE AND RELEASE. Upon performance of the terms and promises contained in this agreement, the Husband and Wife each affirms the same to be a full and complete determination of their individual entitlements, obligations and property interests arising out of, or relating to, their marriage whether founded on statute or common law.
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> * * *
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> 4. DIVISION OF PROPERTY. The parties mutually agree to the following division of all property owned by them, either individually or jointly, regardless of when it was obtained and whether it was a fruit of the marriage or otherwise:
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> a. Military Retirement Pay. When Husband retires from the military services, the Wife shall receive one-half of Husband's military retirement pay which shall continue until the death of the Wife.

(Formatting in original.)

In February 1992, Wife filed for divorce in Guam, which is one of several places the parties had lived during their marriage. In her complaint for divorce, Wife asserted that she "is now and for at least ninety (90) days immediately preceding the filing of this complaint has been a resident of Guam." In the instant case, however, Wife testified that she was living in Palau at the time she filed for divorce in Guam, and there was evidence that Husband at various times sent mail to her address

in Palau. In Wife's Guam action, she served divorce papers on Husband in the Phillippines, where he was serving at the time. That proceeding was stayed at Husband's request, pursuant to the Soldiers and Sailors Civil Relief Act.

About a month after the Guam divorce action was filed, Husband retired from the Navy and returned to Tennessee. Approximately eight months later, in November 1992, he filed for divorce in Bledsoe County. In his complaint, he asserted that Wife's divorce action in Guam "has been dismissed for lack of personal jurisdiction of [Husband]," although, in fact, the final dismissal of the Guam action did not occur until March 1993, and it was dismissed for lack of prosecution. In any event, Husband further asserted in his Tennessee suit that Wife lived in Guam, but that her address "is unknown and cannot be ascertained upon diligent inquiry." Husband therefore requested that the court allow him to serve Wife by publication. This request was granted, and the trial court ordered in December 1992 that notice be published in the Bledsonian Banner, a Bledsoe County newspaper, for four consecutive weeks, and that a copy of the order be sent to Wife's "last known address," which was not identified as a specific mailing address at all, but simply as "Hilaria B. Sullivan, General Delivery, Agana, Guam 9691."[1]

When Wife failed to respond to this "notice," the trial court on February 10, 1993 entered a default judgment against Wife and a final decree of divorce. Significantly, at no time during the 1992-93 divorce proceedings did Husband disclose the existence of the settlement agreement that the parties had signed in 1988. Thus, the court entered its default judgment and divorce decree without any knowledge of the prior agreement's terms. The decree stated, in pertinent part, as follows:

> IT IS . . . ORDERED, ADJUDGED, and DECREED as follows:
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> 1. Plaintiff, [Husband], is hereby awarded an absolute divorce from Defendant, [Wife], and the parties are restored to all the rights and privileges of unmarried persons.
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> * * *
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> 3. Plaintiff shall pay as a division of marital property the sum of $500.00 per month to Defendant. Said payment of $500.00 per month represents Defendant's 1/2 interest in Plaintiff's military retirement benefits accumulated prior to the Parties' separation in March 1988. Said $500.00 per month shall be paid through an allotment of Plaintiff's monthly military retirement check.

(Capitalization in original.)

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[1] Agana is the capital of Guam. It is also known as Hagåtña.

Meanwhile, approximately one month after Husband was granted a divorce in Tennessee, Wife's divorce complaint in Guam was, as mentioned previously, dismissed for lack of prosecution. On April 8, 1993, Husband's public defender in Guam sent a copy of the order dismissing the Guam divorce complaint via certified mail to Wife's post office box in Palau. No copy of the Bledsoe County divorce decree, nor any other notice relating to that action, was ever sent to Wife in Palau.

On December 27, 2002, Wife filed a motion to set aside the Tennessee divorce decree, or, in the alternative, to modify the decree. She alleges that Husband "knew the whereabouts of [Wife] or could have reasonably ascertained her whereabouts" in 1992, and that Husband's assertions "that [Wife's] whereabouts were unknown were fraudulent and intentional misrepresentation." Thus, she argues, "there was improper service on [Wife] and the judgment is void." Yet despite this language, Wife does not cite Tenn. R. Civ. P. 60.02(3), which offers relief from a final judgment where "the judgment is void." Instead, Wife relies upon Tenn. R. Civ. P. 60.02(4) and Tenn. R. Civ. P. 60.02(5), which state as follows:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time[.]

A hearing took place in August 2004 before Chancellor Jeffrey F. Stewart – the same trial judge who had entered the default judgment and divorce decree more than a decade earlier. At the conclusion of the August 2004 hearing, Chancellor Stewart stated in a memorandum opinion that "there was not a diligent inquiry made" into Wife's address in 1992. In support of this finding, he cited evidence that Husband had sent other mail to Wife's address in Palau, and that his attorney in Guam sent mail to the address *after* the Bledsoe County default judgment had been entered. "Even though [Husband] says he didn't know [Wife's address], his lawyer knew it," the court stated. The court concluded, "I think [the address] could have been ascertained fairly easily." At a subsequent hearing, the court summarized its findings with regard to the notice issue as follows:

> [Husband] said he didn't know where [Wife] was, didn't know how to find her, and I think I made findings of fact that he could have easily found her. He knew where the family had lived in Palau. He had children here stateside that knew where their mother was living and could have contacted them. They actually had divorce proceedings pending on the Island of Guam . . . and they had attorneys that could locate one another. And so those were some of the reasons that I set this aside.

In fact, however, the court did not "set aside" the divorce decree in its entirety. Instead, it only set aside the provisions related to property distribution. In its August 2004 memorandum opinion, the court opined as follows:

> [T]his Court turns to Rule 60 to see whether it's appropriate after this long period of time, approximately ten years passage of time, whether this Court should set aside the final decree of divorce. And under Rule 60 it says the Court may relieve a party from a final judgment and it says upon such terms as are just.
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> I think in this particular case that [Husband], thinking that he was, in fact, divorced, has remarried and has also had other children who were born in this relationship. And so I think it would be unjust and unfair for this Court to set aside the divorce as far as the termination of the marital relationship is concerned.
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> * * *
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> I think that it would be only fair and appropriate, though, to litigate the property right that [Wife] has in the military pension. I think it would only be fair because, since Mr. Sullivan's military career covered the period of time from 1961 to 1992 and the marriage occurred and took place from 1965 to 1992, she would have had a significant benefit that would have accrued during that period of time. I don't know whether her allotment based upon this default judgment of $500 a month is appropriate or not.
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> * * *
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> So that will be the judgment of the Court with regard to the Rule 60 motion and we will have to schedule another date to hear the proof on . . . whether any modification of the property right should take place.

The parties presented evidence on the issue of Husband's pension and his military survivorship benefit at a hearing in January 2006. In September 2006, the court announced its decision, awarding Wife "half of what [Husband] was earning at the time of his retirement . . . on April 1st, 1992," retroactive to that date. Technically, that is precisely what the 1993 divorce decree awarded Wife: "one-half of Husband's military retirement pay." However, the court found that Husband had actually been receiving significantly more than $1,000 per month, the amount implied by the previously ordered monthly payments of $500. In fact, the court held, Husband was making approximately $2,450 after taxes as of April 1992, and thus Wife had been entitled to more than $1,200 per month, rather than $500. Giving Husband credit for his prior monthly payments of $500,

and then calculating the owed amount retroactively, the court ordered Husband to pay an arrearage of more than $137,000, as well as monthly sums going forward of a little over $1,200, the latter to be sent directly from the military to Wife in accordance with the provisions of the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408. In addition, the court ordered Husband to remove his current wife as the beneficiary of his Survivors Benefit Plan under 10 U.S.C. § 1448, and instead designate Wife as the beneficiary.

Husband essentially raises three issues. He argues that Wife knew by 1996 that Husband had gotten a divorce, and was therefore barred by the doctrine of laches – or simply by the Rule 60.02 "reasonable time" provision – from asserting her rights six years later, in 2002. He further argues that, even if Wife is entitled to relief, she is not entitled to *retroactive* relief because, in his opinion, Rule 60.02(4) provides only for prospective relief, and Rule 60.02(5) only applies in extraordinary situations. Finally, he argues that ordering Husband to switch the survivorship benefit was improper. We address these issues in turn.

Our review is *de novo* upon the record, accompanied by a presumption of correctness as to the trial court's findings of fact, unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d); ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). As an initial matter, we find nothing in the record to indicate that the evidence preponderates against the court's central factual finding in this case: that Husband could easily have ascertained Wife's address but failed to do so, thus rendering the notice by publication improper and a violation of Wife's due process rights. Accordingly, we hold that the court committed no error in reaching this conclusion.

That said, we note that Wife does not object in her brief to the court's decision not to void the original divorce decree, despite the lack of proper notice. If this were a question of subject matter jurisdiction, we would be compelled to void the decree – notwithstanding that neither party appears to desire such an action, and in spite of the impact it would have on Husband's subsequent remarriage. However, the issue is not one of subject matter jurisdiction. The court's subject matter jurisdiction over the divorce, premised on Husband's residence in Bledsoe County, is unchallenged. The trial court's findings pertaining to the lack of notice to Wife raise an issue of *personal* jurisdiction only. "Personal jurisdiction may be waived; subject matter jurisdiction may not." ***Mid-South Pavers, Inc. v. Arnco Const., Inc.***, 771 S.W.2d 420, 423 (Tenn. Ct. App. 1989). We interpret Wife's decision not to raise any jurisdictional issue on appeal, coupled with her decision to ground her complaint in Tenn. R. Civ. P. 60.02(4) and 60.02(5) rather than Tenn. R. Civ. P. 60.02(3), *i.e.*, the subsection concerning voidness, to be a waiver of the personal jurisdiction issue. Of course, the lack of notice is still her central argument under Rules 60.02(4) and 60.02(5). However, she advances these arguments only with respect to the property issues.

That brings us to Husband's first issue. He argues that Wife's action should be barred because, he says, Wife knew about the Bledsoe County divorce in 1996, yet failed to challenge it until 2002. He bases this claim on deposition testimony by Elizabeth Sullivan, the parties' adult daughter, that upon visiting Wife in Palau for a family funeral in July 1996, she told her mother that

"my dad and his wife" had paid for her plane ticket, and Wife "wasn't surprised" by this statement. However, Wife later contradicted this testimony in open court:

> Q: So your testimony is that during these two weeks that everybody was together for family purposes you didn't mention whether or not the man you thought was then your husband, where he was, how he was doing, what he was doing?
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> A: No, sir.
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> Q: None of that stuff?
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> A: No.
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> Q: Despite the fact your daughter swore under oath to the contrary?
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> A: No. Because, for one, the island is very strongly Catholic. And it was a taboo to talk about divorce[]. . . . [W]e don't talk about that unless I started talking about it. They don't say anything.

The trial court considered both pieces of testimony and concluded, "I think what we have before me is enough evidence for me to decide that in this particular case [Wife] did not have notice of this marriage [*i.e.*, Husband's remarriage] and divorce having occurred." We are not in a position to second-guess the trial court's factual determination on this point, involving, as it does, a credibility determination, particularly where Wife appeared in person before the court. "The trial court is uniquely positioned to observe the manner and demeanor of witnesses." ***Fell v. Rambo***, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). In any event, we hold that the evidence does not preponderate against the court's finding that Wife had no notice of the 1993 divorce until shortly before instituting this action in 2002. Accordingly, neither the doctrine of laches nor the "reasonable time" requirement of Tenn. R. Civ. P. 60.02 bars this action.

Husband next claims that neither Tenn. R. Civ. P. 60.02(4) nor Tenn. R. Civ. P. 60.02(5) can provide Wife with retroactive relief on these facts. The trial court did not specify whether the basis for its ruling was Rule 60.02(4), Rule 60.02(5), or both. However, Husband notes that the applicable language of Rule 60.02(4) provides for relief where "it is no longer equitable that a judgment should have *prospective* application." (Emphasis added.) He argues that this language precludes retroactive relief, such as the court's decision to award Wife the value of the retirement payments that she should have received from 1993 onward. As for Rule 60.02(5), Husband points to case law indicating that this "catch-all provision" is to be "narrowly construed" and applied "only in the most unique, exceptional, or extraordinary circumstances." ***Duncan v. Duncan***, 789 S.W.2d 557, 564 (Tenn. Ct. App. 1990). Husband argues that Wife's case does not meet that high burden.

We decline to rule on whether the pertinent portion of section (4) applies only prospectively. The language in question is as follows: "the court may relieve a party . . . from a final judgment . . . [where] it is no longer equitable that a judgment should have prospective application." Tenn. R. Civ. P. 60.02(4). Reasonable arguments can be made on either side of this question. On the one hand, it could be argued that the justness of "prospective application" is the test for whether relief is appropriate. We note that the *relief* is not explicitly described as "prospective"; the language states simply that the court may "relieve a party . . . from a final judgment," not from the prospective aspects of a final judgment. Thus, it could be argued that the "prospective application" language is simply and solely a part of the test for whether *any* relief may attach, not a limitation on the form of the relief itself, once it attaches. Yet the contrary argument is also plausible. The two cases cited by Husband on this point, ***State ex rel. Taylor v. Wilson***, No. W2004-00275-COA-R3-JV, 2005 WL 517548 (Tenn. Ct. App. W.S., filed March 3, 2005), and ***State ex rel. Parks v. Parks***, No. W2005-00957-COA-R3-JV, 2006 WL 2032560 (Tenn. Ct. App. W.S., filed July 19, 2006), appear to *assume*, but do not actually hold, that Tenn. R. Civ. P. 60.02(4) can only provide prospective relief. We have found no case law clearly deciding this question.

However, we need not decide this issue here because we find that section (5) is adequate to support the court's ruling. Assuming *arguendo* that section (4) is not applicable to these facts, the ruling still stands if it is supportable under section (5), which has no limitation on retroactive application.[2] It is immaterial that the court did not specifically state which of the two sections it was basing its decision on, since even if the court relied solely upon section (4), we would uphold the ruling so long as it is supportable under either section. *See* ***Shutt v. Blount***, 249 S.W.2d 904, 907 (Tenn. 1952) ("if the Trial Judge reached the right result for the wrong reason, there is no reversible error").

Accordingly, we turn our attention to Tenn. R. Civ. P. 60.02(5). Husband is correct that this "catch-all" rule is applied only in extraordinary circumstances. *See* ***Federated Ins. Co. v. Lethcoe***, 18 S.W.3d 621, 624 (Tenn. 2000) ("[r]elief under Rule 60.02(5) is only appropriate in cases of overwhelming importance or in cases involving extraordinary circumstances or extreme hardship"). The trial court recognized this fact, opining as follows in its memorandum opinion:

> Rule 60 is an extraordinary relief that our Courts grant to litigants. And it is, I think, without wavering, the Court's opinion, the Appellate Court's and Supreme Court's position that it should be only

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[2] Husband attempts to argue that Tenn. R. Civ. P. 60.02 "in general," and not just section (4) in particular, is designed to operate only prospectively. In particular, he points to the phrase "relief from the operation of a judgment" as suggesting that section (5), too, can provide only prospective relief. According to Husband, that phraseology – especially the word "relief" – "logically contemplates that if the Courts choose to allow a 60.02 motion, that it only have effect from the *filing of the motion* and not back to the entry of the Order the Trial Court is giving 'relief from.'" (Formatting in original.) We find this interpretation unpersuasive. It appears plain to us that, whatever Tenn. R. Civ. P. 60.02(4) might say about prospective versus retroactive effect, Tenn. R. Civ. P. 60.02(5) is silent on the issue. In the absence of any authority suggesting that section (5) cannot provide retroactive relief, we find no merit in Husband's argument.

> granted under extraordinary circumstances as far as relief from a judgment that's been of record.

Having recognized this legal principle, the court nevertheless granted relief, indicating that it believed these circumstances are indeed extraordinary. We find this belief to be eminently reasonable. "A fundamental requirement of due process is notice and an opportunity to be heard." ***Phillips v. State Bd. of Regents***, 863 S.W.2d 45, 50 (Tenn. 1993). As already noted, the evidence does not preponderate against the court's factual findings regarding the lack of notice. We think Wife is right when she argues that a default judgment entered in the absence of proper notice, thus depriving her of due process, can fairly be described as an "extraordinary circumstance." As the Supreme Court has noted, "courts often apply a different standard when faced with a Rule 60 motion in regard to a default judgment." ***Tenn. Dept. of Human Services v. Barbee***, 689 S.W.2d 863, 867 (Tenn. 1985). Thus, in a case of a default where a party claimed "he was purposefully deprived of notice of the proceeding against him," this court vacated the judgment under Rule 60.02(5), citing constitutional due process grounds. ***McNair v. Smith***, No. 03A01-9804-CH-00122, 1999 WL 233404, at *4 (Tenn. Ct. App. E.S., filed April 15, 1999). A similar result is appropriate here. We therefore affirm the trial court on this issue.

Husband's final issue merits little discussion. He objects in general terms to the court's order requiring that he make Wife the beneficiary of his military Survivor Benefit Plan under 10 U.S.C. § 1448. Husband argues that he should be able to keep his current wife as the beneficiary of this plan. Yet he cites no authority for the proposition that the court's order mandating a switch is improper, and we have found none. On the contrary, in ***Nelson v. Nelson***, 106 S.W.3d 20, 24 (Tenn. Ct. App. 2002), this court held that it was not an abuse of discretion for the trial court to require an ex-husband to transfer his 10 U.S.C. § 1448 survivorship benefit to his ex-wife. In the instant case, the vast majority of Husband's military service occurred during the marriage, so the court reasonably concluded that it is just for Wife to receive the benefit of the survivorship plan that accrued because of service during this time. In addition, although the parties' 1988 separation agreement does not specifically mention the Survivor Benefit Plan, the court interpreted the agreement as logically requiring that Wife be named the survivorship beneficiary, in accordance with the document's provision that "Wife shall receive one-half of Husband's military retirement pay which shall continue *until the death of the Wife.*" (Emphasis added.) Under 10 U.S.C. § 1408, which governs the allocation of Husband's pension, Wife would receive no pension after Husband's death if he were to die first. 10 U.S.C. § 1408(d)(4). Thus, her share of his military benefits would not necessarily "continue until [her] death" unless she is also the beneficiary of his Survivor Benefit Plan. We find no error in the court's conclusion.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Richard B. Teeter. This case is remanded to the trial court for enforcement of the trial court's judgment and for collection of costs assessed below, all pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE